Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)))	MB Docket No. 13-236

COMMENTS OF NEXSTAR BROADCASTING, INC. IN SUPPORT OF PETITION FOR RECONSIDERATION

Nexstar Broadcasting, Inc. ("Nexstar") submits these comments in support of the Petition for Reconsideration (the "Petition") filed by Ion Media Networks and Trinity Christian Center of Santa Ana, Inc. (the "Petitioners") of the FCC's UHF Discount *Order*.[1] As one of the nation's leading diversified media companies, Nexstar owns, operates, programs, or provides sales and other services to 104 full power television stations reaching 62 markets, or approximately 18.1% of all U.S. television households.[2] Nexstar has a long tradition of serving the communities in which its stations are located through extensive investments in superior local news and public affairs programming.[3]

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[1] *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Report and Order*, 31 FCC Rcd. 10213 (2016) (the "*Order*"). Notice of the Petition was published in the *Federal Register* on December 12, 2016, and the FCC extended the deadline for filing comments until January 10, 2017. *See* 81 Fed. Reg. 89424 (Dec. 12, 2016); DA 16-1420 (rel. Dec. 20, 2016). Although the Commission's rules do not expressly provide for the filing of formal comments in support of a petition for reconsideration, Nexstar, as demonstrated herein, has an interest in this proceeding, and is submitting these comments prior to the opposition deadline to ensure that no party is prejudiced by their filing. To the extent necessary, Nexstar requests that the Commission consider this submission as informal comments.

[2] Upon consummation of its proposed transaction with Media General, Inc., Nexstar will own, operate, program or provide sales and other services to 171 television stations and their related low power and digital multicast signals reaching 100 markets or 38.905% of all U.S. television households.

[3] *See e.g.*, Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC, MB Docket No. 02-277 et al. (Jan. 2, 2003); Reply Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC, MB Docket No. 02-277 et al. (Feb. 3, 2003); Comments of Nexstar Broadcasting, Inc., MB Docket 04-256 (Oct. 24, 2004); Comments of Nexstar Broadcasting, Inc., MB Docket No. 06-121 et al. (Oct. 23, 2006); Reply Comments of Nexstar Broadcasting, Inc., MB Docket No. 06-121 et al. (Jan. 16, 2007); Comments of Nexstar Broadcasting, Inc., GN Docket No. 10-25 (May 7, 2010); Comments of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (NOI) (July 12, 2010); Reply Comments of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (NOI) (July 26, 2010); Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 09-182 and 07-294 (Mar. 5, 2012); Reply

I. THE UHF DISCOUNT ORDER AMOUNTS TO AN ARBITRARY AND CAPRICIOUS TIGHTENING OF THE CONGRESSIONALLY MANDATED NATIONAL OWNERSHIP CAP.

The FCC's *Order* improperly attempts to divorce the UHF discount from the national audience reach cap despite the fact that the two are inextricably intertwined and must be considered in tandem. Consistent with its public interest mandate, when the Commission alters a component of a multi-faceted rule such as the national audience reach cap, it must consider the effect of its action on the rule as a whole.[4] Because the FCC failed to consider the effect eliminating the UHF discount would have on the national cap, the *Order* is arbitrary and capricious.[5] Had the Commission properly evaluated the national audience reach cap in its entirety, it not only would have found no justification for tightening the cap, but it likely would have concluded that the cap no longer serves the public interest (if it ever did) and should be eliminated or at least relaxed. The FCC's sole focus on one aspect of the national cap renders the decision to eliminate the UHF discount unlawful.

A. The Commission May Not Eliminate the UHF Discount Without Considering Its Effect on the National Audience Reach Cap.

The FCC's consideration of the UHF discount in a vacuum, without the context of the national audience reach cap as a whole, resulted in a flawed analysis that was arbitrary and capricious. From their inception, the national audience reach cap and the UHF discount have existed hand-in-hand. The Commission first introduced a national audience reach cap in 1985,

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Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 09-182 and 07-294 (Apr. 17, 2012) (*Nexstar 2012 Reply*"); Notice of Ex Parte Communications on behalf of Nexstar Broadcasting, Inc. and Mission Broadcasting, Inc., MB Docket No. 09-182 (Jan. 16, 2013); Written Ex Parte Presentation of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (Jan. 24, 2013); Written Ex Parte Presentation of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (Feb. 20, 2014); Written Ex Parte Presentation of Nexstar Broadcasting, Inc., MB Dockets No. 10-71, 09-182, 07-284, 04-256 (Mar. 10, 2014); Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 14-50 and 09-182 (Aug. 6, 2014) (including excerpts from previous filings in Exhibit A).

[4] *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3d Cir. 2016).

[5] *See* Dissenting Statement of Commissioner Ajit Pai ("Pai Dissent") at 10252 (contending that the FCC acted unlawfully by eliminating UHF discount without considering adjustment to national cap).

prohibiting a single entity from owning television stations that reached collectively more than 25 percent of the total nationwide audience.[6] As part of the *1985 Order*, the FCC also adopted the so-called UHF discount, attributing only 50 percent of the television households in a UHF station's market area toward the national audience reach cap.[7] It is simply not credible to suggest that the Commission considered each of these components of the *1985 Order* in isolation. To the contrary, the FCC was well-aware that the effect of these rules was to permit a single entity to own television stations reaching up to 50 percent of the nationwide audience if one or more of the stations was UHF.

The UHF discount is as much a part of the current national audience reach cap as it was part of the original cap. In the 2004 Consolidated Appropriations Act (the "CAA"), Congress directed the Commission to raise the national audience reach cap to 39%.[8] As the Petitioners explain, "both the FCC and the Courts have recognized that the CAA represents Congress's judgment that the national cap with the UHF Discount should be set at 39%."[9] Indeed, the record makes clear that Congress was well-aware of the UHF discount when it directed the FCC to increase the cap to 39 percent.[10] Thus, the relationship between the UHF discount and the national audience cap is no different from the relationship between joint sales agreements and the local television ownership rule.[11] Just as the Commission had an obligation to consider the

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[6] *Order* ¶ 4 (citing Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 100 FCC 2d 74, 90-92 ¶¶ 38-40 (1985) (the "*1985 Order*")).

[7] *Id.* ¶ 5 (citing *1985 Order* ¶ 43).

[8] *See id.* ¶ 11 (citing Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004)).

[9] Petition at 3.

[10] *See, e.g.*, Sinclair Comments at 5-7; Fox Comments at 4-12; Letter from Jared S. Sher, Senior Vice President and Associate General Counsel, 21st Century Fox, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-326, at 1-2 (filed June 9, 2016); Univision Comments at 13; ION Comments at 11-12; Trinity Comments at 1-5.

[11] *See* Pai Dissent at 10247.

totality of the local television ownership rule when modifying the JSA attribution rule, as the United States Court of Appeals for the Third Circuit has confirmed, so too did it have an obligation to consider the totality of the national audience reach cap when modifying the UHF discount.[12]

Nevertheless, in the *Order* the FCC explicitly *declined* to consider whether the cap itself remains necessary or whether it needs to be adjusted to account for the elimination of the UHF discount, stating simply that "reexamining the cap is not within the scope of the notice."[13] This failure to consider the rule as a whole not only was inexplicable, it was unlawful. As Commissioner Pai explained, once the Commission chose to review one aspect of the national cap, it was prohibited from taking "piecemeal action that would substantially tighten it without examining whether tightening the rule as a whole is justified."[14] Indeed, eliminating the UHF discount necessarily results in a tightening of the national audience reach cap: whereas, previously, an entity could own stations reaching up to 78% of the nationwide audience, as a result of the *Order* an entity is now subject to a hard limit of 39%. If the FCC believed that its Notice of Proposed Rulemaking was too narrow to conduct a proper analysis of the national audience cap as a whole, the solution was to issue a Further Notice of Proposed Rulemaking, not to adopt a rule that disregards the agency's obligation to engage in reasoned decision-making. The Commission's failure to even consider whether a tightening of the national audience reach cap was in order must be reversed.

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[12] *See id.* at 10247-48 (citing *Prometheus Radio Project*, 824 F.3d at 58); Petition at 3-4.

[13] *Order* at 10232 ¶ 40.

[14] *Id.* at 10248.

B. <u>The Commission Has Provided No Rational Justification for Tightening the National Audience Reach Cap at This Time.</u>

Although the *Order* necessarily has the effect of tightening the national audience reach cap, the FCC has not even attempted to justify such a result—nor could it. As Commissioner Pai explained:

> [W]e are now facing a 39% national cap that has not been adjusted or reviewed for a dozen years. During that time, the video industry has undergone revolutionary change. In particular, the rise of over-the-top video has transformed the video marketplace. For instance, Netflix, YouTube, Amazon, and Hulu all did not offer Internet video when the national cap was set at 39%. We are confronting a 39% national cap that the Commission itself has never justified. Indeed, the last time that the Commission reviewed the merits of the national cap it concluded that a 45% cap was justified. And we are dealing with a 39% cap that approximates the cap that the D.C. Circuit rejected over a decade ago.[15]

Indeed, "the video marketplace has transformed dramatically" and is "now more competitive than ever,"[16] with today's media consumers having access to "literally hundreds of competitive pay TV channels and essentially unlimited competitive Internet content."[17]

Nexstar and other commenters have documented these dramatic marketplace changes in the Commission's many media ownership proceedings over the years,[18] and these developments

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[15] *Id.* at 10249.

[16] *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Second Report and Order, FCC 16-107 (rel. Aug. 25, 2016), Dissenting Statement of Commissioner Ajit Pai at 182.

[17] *Id.*, Dissenting Statement of Commissioner Michael O'Rielly at 197.

[18] *See, e.g.*, Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 14-50 *et al.*, at 5-7 (Aug. 6, 2014); Comments of the National Association of Broadcasters, MB Docket Nos. 14-50 *et al.*, at 9-38 (Aug. 6, 2014); Comments of the Coalition of Smaller Market Television Stations, MB Docket Nos. 14-50 *et al.*, at 1, 6 (filed Aug. 6, 2014); Comments of Fox Entertainment Group and Fox Television Holdings, Inc., MB Docket No. 09-182, at 7-15 (Mar. 5, 2012), *attached to* Letter from the Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 14-50 (Aug. 6, 2014); Nexstar Broadcasting, Inc. Ex Parte, MB Docket Nos. 14-50, *et al.*, at 10-12 (Mar. 14, 2014).

have continued unabated with no sign of slowing down.[19] New sources of video content are not just available to consumers; they are considered to be as helpful, or more helpful, than traditional media—particularly among persons aged 18-49.[20] The fact is, the Internet and other new media have revolutionized the way that Americans consume news and information, with all of these media vying for the attention of American consumers. As new media alternatives succeed in shifting consumer attention away from local television stations, those stations' advertising revenues, and concomitantly their ability to produce high-quality local programming, suffers.[21] Meanwhile, local broadcasters like Nexstar, which is focused on delivering quality local news and entertainment programming to viewers in small and mid-sized markets, must also contend with vertically and horizontally integrated multimedia companies, multimedia companies that own multiple cable networks and websites with international reach, and MVPDs.[22] In light of the current state of the marketplace, there is simply no justification for tightening the national audience reach cap, but that is precisely what the FCC has done by eliminating the UHF discount.

[19] *See, e.g.*, NAB Ex Parte, MB Docket Nos. 14-50 *et al.*, at 2 (Aug. 25, 2016) (discussing and attaching New York Times article demonstrating that Facebook and its "native news sources" have "centralized online news consumption in an unprecedented way" (citation omitted)) ("*NAB Aug. 26 Ex Parte*").

[20] Indeed, a Pew Research Center study of news and information sources during the 2016 Presidential election found that 24 percent of Americans deemed cable TV news to be the most helpful; 14 percent deemed social media to be the most helpful; and 13 percent deemed news websites and apps most helpful. *See* Jeffrey Gottfried, *et. al.*, *The 2016 Presidential Campaign – a News Event That's Hard to Miss*, Pew Research Center, Journalism & Media (Feb. 4, 2016), http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/.

[21] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, *44 n.545 (¶ 141 n.545) (2015) ("Advertisers and audiences are mutually dependent. Television stations need to attract audiences in order to earn money from advertising. They need advertising revenues in order to make investments in programming that will attract audiences.") (citing David S. Evans & Richard Schmalensee, The Industrial Organization of Markets with Two- Sided Platforms, COMPETITION POL'Y INT'L 151, 155-56 (2007)); Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in Broadcasting*, at 2 (June 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894941 (noting that "market fragmentation has reduced broadcasters' revenues and made it difficult or impossible to defray fixed costs based solely on traditional advertising").

[22] *See Nexstar 2012 Reply* at 3-4.

II. CONCLUSION

For the foregoing reasons, the Commission's elimination of the UHF discount was improper, unjustified, and unlawful. The FCC should reverse its decision and either terminate this proceeding or consider whether the national audience reach cap as a whole remains necessary given the sweeping changes in the media landscape.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacqueline Martin, certify that on this 10th day of January 2017, I caused a copy of the foregoing Comments of Nexstar Broadcasting, Inc. In Support of Petition for Reconsideration to be served by first class mail, postage prepaid, upon the following:

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